No. 320

By. of Col. Green for C

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JAMES H. McKENN

Supreme Court of the United States

No. 320
October Term, 1899.

The Yazoo & Mississippi Valley Railroad Company,
Appellant
vs.
Wirt Adams, State Revenue Agent, and the Railroad Commission of the State of Mississippi, Et Als.

Brief in Support of Motion to Dismiss or Affirm.

S. S. CALHOON,
MARCELLUS GREEN,
Attorneys for Appellees.

17,496

In the Supreme Court of the United States

OCTOBER TERM, 1899.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY,
Appellant

vs. } No. 320

WIRT ADAMS, STATE REVENUE AGENT, ET ALS.
Appellees

ON MOTION TO DISMISS OR AFFIRM.

BRIEF FOR APPELLEES, BY S. S. CALHOON AND MARCELLUS GREEN.

Statement of Case.

The Yazoo & Mississippi Valley Railroad Company, a corporation of the State of Mississippi, filed its original bill in the Circuit Court of the United States, in equity, against Wirt Adams, State Revenue Agent of the State of Mississippi, and the sheriffs of each county wherein the property of complainant was situated, averring that the Natchez, Jackson & Columbus R. R. Co. was chartered July 21, 1870, and that by act approved August 8, 1870, the twenty-first section of the charter of the Mobile & Northwestern R. R. Co. was extended to it (R. 2, 3), said twenty-first section being set out on page 2 of Record; that Natchez, Jackson & Columbus R. R. Co. accepted said charter and amendment, and relying thereon built the road, contracting a construction debt of $1,250,000 of bonds; that said twenty-first section constituted an irrepealable contract of appropriation, whereby the Legislature, in consideration of the construction of said road, did appropriate and set apart all taxes to which said company should be liable or subject for the period of thirty years, both privilege and *ad valorem*, to be applied to the payment of debts

and liabilities which said company should incur in the construction of said road, or for money borrowed to be used in constructing said road or in the payment of debts incurred, or money borrowed to pay debts incurred in constructing said road; that it was the duty of the tax collector in each county to give a receipt for such taxes upon the presentation of the prescribed affidavit. R. 3.

That Memphis & Vicksburg R. R. Co. was chartered in 1870; and by act of 1882, Acts 1882, p. 1011, as amended by act of 1884, approved March 15, 1884, Acts 1884, p. 936, a consolidation was authorized by said Memphis & Vicksburg R. R. Co. with any other company; and by section 5 of said act of 1882 the said twenty-first section was extended to said consolidated company. R. 5.

That a consolidation was effected under said act of 1884, between Memphis & Vicksburg R. R. Co., the New Orleans, Baton Rouge, Vicksburg & Memphis R. R. Co., another Mississippi corporation, and a Tennessee and a Louisiana corporation, under the name of Louisville, New Orleans & Texas Railway Company; and proceeding under the charters of the constituent companies, under the act of March 3, 1882, and said amendatory act of March, 1884, it speedily constructed the railway, the first through train running October 1, 1884; that said road was constructed on the faith of said twenty-first section.

That Natchez, Jackson & Columbus R. R. Co. was authorized to sell its railroad, franchises, privileges and immunities by act of 1890, and said L. N. O. & T. Ry. Co. bought the same and paid therefor. R. 6.

That complainant was chartered in 1882, a Mississippi corporation; and on October 24th, 1892, complainant and said Louisville, New Orleans & Texas Ry. Co., pursuant to their respective charters, effected a consolidation whereby the existence of Louisville, New Orleans & Texas Ry. Co. was merged into that of Yazoo & Mississippi Valley R. R. Co., complainant, whereby complainant became vested with all of the rights of said Natchez, Jackson & Columbus R. R. Co., and of said Louisville, New Orleans & Texas Ry. Co., in respect to taxes and said contract of appropriation.

That in 1898, under the Code of 1892, the State Railroad Commission assessed for taxes said railroad property formerly belonging to Natchez, Jackson & Columbus R. R. Co. and formerly belonging to Louisville, New Orleans & Texas Ry. Co.

That under said twenty-first section complainant had the right to pay off said taxes by paying a sum of money on the construction debt of Natchez, Jackson & Columbus R. R. Co. in amount equal to the taxes for that year on said N. J. & C. R. R. Co. property, and by tendering to said several sheriffs the affidavit to that effect prescribed by said section 21, and in like manner paying the said taxes on the property formerly belonging to L. N. O. & T. Ry. Co., and that said sheriffs should execute a receipt for said taxes.

That complainant has tendered to said sheriffs said affidavits in conformity to said twenty-first section; but said sheriffs, in disregard of complainant's contract rights, refuse to receive the said affidavits, and have refused to execute the said receipts for said taxes, and insist upon payment thereof in money. That said Wirt Adams, State Revenue Agent, also, in disregard of said contract, "threatens to sue, in his capacity as State Revenue Agent, to collect the said taxes in currency"; the intent of said sheriffs and of said State Revenue Agent being to deny complainant's contract rights in the said twenty-first section and the benefit of the appropriation theretofore made of the amount of said taxes to said construction debts, and to force the payment of said taxes in money.

That complainant is a taxpayer within the statute of Mississippi, authorizing an injunction of attempts to collect taxes not authorized by law. Code 1892, sec. 483.

That said sheriffs have power to force payment of said taxes by seizure and sale of property, and that they will do so, and thereby a multiplicity of suits and seizures is threatened. That the assessment constitutes a lien, and that it casts a cloud on title. That if said taxes are paid under protest and suits brought to recover back complainant would be burdened with a multiplicity of suits, and at great cost and expense. That complainant is without effectual remedy at law, and is relievable only in equity.

That the amount of said taxes exceeds $2000. That the

said demands of defendants and their threatened action in the prosecution thereof are asserted under the Code of 1892, and the act of 1894 defining the power of State revenue agent, enacted subsequently to said acts investing Natchez, Jackson & Columbus R. R. Co. and Louisville, New Orleans & Texas Ry. Co. and complainant with their rights in the premises, "and such demands and threatened action on the part of the defendants herein are in contravention of the contract rights of your orator, and in violation of section 10, Art. I of the Constitution of the United States, which forbids any State to pass any law impairing the obligation of a contract." R. 10.

That defendants pretend that said acts of 1870, 1882 and 1884, in so far as they confer said contract rights under said 21st section, were repealed by the acts of 1886, and, if then existent, by the Code 1892, which complainant denies, and if said acts do undertake such repeal they would violate said sec. 10, Art. I.

That defendants pretend that said contract rights were waived or lost by said consolidation of October 24, 1892, but this complainant denies, and avers that the Lambert case, 70 Miss. 779, is *res adjudicata* as to the effect of said consolidation of Oct. 24, 1892.

That defendants pretend that said contract rights under said 21st section were lost by the consolidation of October 24, 1892, under the operation of secs. 180 and 181, Const. 1890; this complainant denies, and avers that said Constitution of 1890, being adopted subsequently to the time that said contract rights became vested, could not, without violation of said sec. 10, Art. I, impair the obligation thereof.

The bill prays that said defendants be "enjoined from bringing any suits against your orator for the recovery of said taxes, or seizing your orator's property under any distress warrants or otherwise, or taking any steps or proceedings whatever for the recovery or collection of such taxes; that on final hearing the injunction be made perpetual, and that it may be decreed that by the said payment of said construction debts and the tender of said affidavits said taxes were paid, and that said assessment be satisfied."

Fiat for injunction was granted, restraining defendants "from further proceeding to collect the taxes mentioned * * * either by suit or otherwise, or proceeding against the property of said complainant by suit, seizure or distress or otherwise (R. 15)," and a writ of injunction was granted accordingly. R. 16. By consent this injunction was treated as a restraining order.

All of the sheriffs answered, stating that they had not seized, levied on, nor were they about to seize or levy on, said railroad property for taxes; that they had not given said railroad company or its agents or officials any reason to believe that they were, by threats or otherwise; and that the application for an injunction against them was unnecessary and uncalled for. R. 18, Ans. Sessions. Other answers the same. R. 20, 5.

The State Revenue Agent and said sheriffs then moved to discharge the restraining order and to quash the injunction writ, protesting against the grant of any injunction, because (1) on the disclaimers of said sheriffs the granting of an injunction would be unnecessary and improper; (2) the State revenue agent has no authority to distrain, levy on or sell anything for taxes; that he can only sue therefor in a court of competent jurisdiction, and an injunction against bringing such suit would be an injunction against the State of Mississippi, and forbidden by the 11th amendment to the Constitution of the United States; (3) this court has no jurisdiction; (4) the bill shows no right to an injunction or relief.

Complainant moved for an injunction. Evidence was introduced on the hearing of these motions. The Record in Miss. Mills v. Cook, 56 Miss. 40, was read, and by agreement, R. 20, the original bill therein only is in this Record. The rest of the Record as set forth in said 56 Miss. Report, p. 40, was agreed to be a part thereof. That bill, R. 25, alleged that in 1872 the Legislature had, "by a general law," passed in order to invite and stimulate manufacturing enterprises in the State, and to diversify and multiply its industries, declared that the State hereby agrees with any and all manufacturing companies in this State * * that all taxes to which said company or companies shall be subject for the period of ten years, should be appropriated and set apart and shall be applied to the pay-

ment of the debts and liabilities which any of said companies may have incurred in the construction of factories," etc., and following generally the terms of said 21st section as to payment of affidavit. That said mills had accepted said acts and on the faith thereof had constructed its factory. That said mills owned outlying lands not by way of investment. That in 1877 an act was passed repealing said act of 1872, as amended by the act of 1873, as to all property except the factory buildings, machinery and factory site; and that the tax collector, Cook, will accept the affidavit in payment of the taxes on the mill proper, but refuses to do so as to these outlying lands; avers that the act of 1877 impairs the obligation of complainant's contract in violation of the Federal Constitution. Prays injunction against the tax collector, Cook, to restrain the collection of the tax. There was a general demurrer to the bill which was sustained on March 12, 1878. R. 20. The Miss. Mills appealed, and the case was decided at the April term, 1878. R. 20.

The Record in Natchez, Jackson & Columbus R. R. Co. and Yazoo & Mississippi Valley R. R. Co. v. Lambert, sheriff of Adams county, R. 31, was read in evidence, and by agreement, R. 20, only the bill, exhibits, plea, R. 49, and demurrer are copied, and the printed report of the case, 70 Miss. 779, is treated as part of the Record.

This bill was filed January 9, 1893, and a demurrer was sustained to it by the chancery court, and on appeal this decree on demurrer was reversed, May, 1893, and this decree on demurrer is relied on as *res adjudicata*. The bill was filed by Natchez, Jackson & Columbus R. R. Co. joining Yazoo & Mississippi Valley R. R. Co. as complainant, seeking to enjoin the *ad valorem* taxes of 1891 and 1892, assessed in the county of Adams, against the property formerly belonging to Natchez, Jackson & Columbus R. R., upon the averment that said Natchez, Jackson & Columbus R. R. Co. was chartered by the Legislature of the State of Mississippi in 1870, and afterward had said 21st section extended to it by the act of 1870; that in 1878 said charter was amended and said 21st section was reënacted; that under the act of 1890, authorizing a sale or consolidation, a sale was made of all the "property, rights,

franchises and immunities" of Natchez, Jackson & Columbus R. R. Co. to Louisville, New Orleans and Texas Ry. Co.; that the franchise to be a corporation was not embraced in said sale, and that Natchez, Jackson and Columbus R. R. Co. continued to be a "going" corporation; that Memphis & Vicksburg R. R. Co. was chartered by the Legislature of Mississippi in 1870, and New Orleans, Baton Rouge, Vicksburg & Memphis R. R. Co. in 1882; and that these were consolidated with a Tennessee and a Louisiana corporation under the act of the Legislature of the State of Mississippi, approved March 3, 1882, entitled, "An Act to Authorize the Memphis & Vicksburg Railroad Company and the Mississippi Valley & Ship Island Railroad Company to Effect a Consolidation," as amended by the act of 1884, erroneously stated 1882, and became Louisville, New Orleans & Texas Ry. Co.; that Yazoo & Mississippi R. R. Co. was chartered in February, 1882, by the Legislature of Mississippi; that on October 25, 1892, Louisville, New Orleans and Texas Ry. Co. was "merged into and consolidated with the Yazoo & Mississippi Valley R. R. Co., and that by said merger and consolidation" the capital stock, franchises, etc., theretofore belonging to Louisville, New Orleans & Texas Ry. Co. were merged into and became the property of Yazoo & Mississippi Valley R. R. Co., as will appear by a copy of the act of consolidation made exhibit to the bill; that said "merger and consolidation" was authorized by the charters of said respective companies; that upon this "merger and consolidation" Yazoo & Mississippi Valley R. R. Co. became entitled to the immunity from taxation under said 21st section theretofore belonging to Natchez, Jackson & Columbus R. R. Co.; that by said 21st section "all taxes, State, county and municipal, theretofore levied and assessed or thereafter to be levied and assessed upon the property of the Natchez, Jackson & Columbus R. R. Co., were by the State of Mississippi and by the provisions of said act appropriated and set apart, and were to be applied in the manner and for the purposes mentioned in said 21st section, * * * and that said appropriation and application was to continue for 30 years," etc. R. 33. "That said contract and agreement on the part of the State of Mississippi went far beyond the mere privilege of an

exemption from taxation, the State having solemnly agreed in said contract, and by the acts of the Legislature aforesaid, that if said company should construct a railroad as provided for in its charter and the amendments thereto, and should incur debts and liabilities in so doing, that unless the earnings of said company should entitle it to declare and pay to its stockholders a dividend of 8 per cent. upon its capital stock, over and above its liabilities, that the taxes to which it was subject for the term of 30 years from the date of the incorporation, in 1870, should be appropriated by the State of Mississippi to the payment of the debts and liabilities incurred by the company in building said road." R. 37.

The affidavits of payment of taxes, made exhibits to that bill, show that Natchez, Jackson & Columbus R. R. Co. was then a "going" corporation, and that said Natchez, Jackson & Columbus R. R. Co. had paid the taxes for 1891 and 1892 by an appropriation of the amount of the taxes to *its* debts of construction, etc. R. 42, 46.

This bill was demurred to, but not on any constitutional grounds, nor because the said 21st section had been repealed. A plea was filed also of *res adjudicata;* in that, Louisville, New Orleans & Texas Ry. Co., on February 29, 1892, before consolidation with Yazoo & Mississippi Valley R. R. Co., had exhibited its bill in said court against said Lambert, sheriff, to restrain the collection of the identical tax for 1891, to which bill a demurrer had been sustained and the bill dismissed, and from said decree an appeal was then pending, and that said decree was a bar. R. 50, 20.

Certified copies of the decisions of the Supreme Court of Mississippi in Wirt Adams, State Revenue Agent, v. Yazoo & Mississippi Valley R. R. Co. et al., rendered June 28, 1898, and November 22, 1898, may be used as published in Mississippi decisions, were agreed to be used in connection with briefs of counsel. R. 20.

The court *a quo*, upon the pleadings and evidence, "finds that the complainant has shown no right to invoke the jurisdiction of this court, and further being of opinion that this court has no jurisdiction," and the motion to discharge the restraining order was sustained; that to grant an injunction was denied. R. 51.

Thereupon appellant prayed and obtained an appeal from said interlocutory decree, with *supersedeas*, to the United States Circuit Court of Appeals for the Fifth Circuit, and there assigned for errors—

1. That upon the bill and proofs the restraining order should not have been discharged.

2. That upon the bill and proofs the injunction should have been granted.

Thereafter, after a hearing of the merits, the Court of Appeals, *of its own motion*, dismissed the appeal. 93 Fed. 852.

Thereupon defendants entered a special appearance, and moved the court to dismiss the original bill because its sole object was to obtain an injunction, and this had been refused, and the appeal from this decree had been dismissed by the Court of Appeals for want of jurisdiction. This motion was sustained, the appellant's counsel being present in court and making no objection on the ground that the mandate from the Court of Appeals had not been filed, and the bill was dismissed. R. 56.

Thereupon the appellant petitioned for an appeal to this court under paragraph 1 of sec. 5 of Judiciary Act of March 3, 1891, and assigned for error—

That the court erred in dismissing the bill "for want of jurisdiction to entertain the same." R. 57.

The court below granted the appeal "solely on the question of jurisdiction, this court having refused to assume jurisdiction of the cause." R. 58.

In the recital of the averments of the bill, as a predicate for the certificate, it is erroneously recited that the Railroad Commission of Mississippi are made defendants to the bill, and that they and Wirt Adams, State Revenue Agent, inaugurated a proceeding under the Code of 1892 and act of 1894, and under sec. 180, Constitution 1890, to assess taxes against the property formerly of Natchez, Jackson & Columbus R. R. Co., but now of appellant, and also to assess taxes against the property that was formerly that of Louisville, New Orleans & Texas Ry. Co., but now of appellant, and to collect the same in currency, by seizures under distress warrants, and by suits brought thereupon by the State Revenue Agent (R. 61); that "the

bill further alleged that the proceeding by the State Revenue Agent and the said Railroad Commission complained of in said bill was an attempt to enforce against the charter rights subsequent legislation, viz.: the statutes of 1892 and 1894, and sec. 180, Constitution 1890" (R. 62); "and also the said bill alleged that the attempt of the said Railroad Commission and said revenue agent was to fasten upon said railroad a paramount lien under the subsequently enacted statutes," etc. (R. 62); that "the State Revenue Agent and the Railroad Commission and their clerk moved the court to discharge said restraining order," etc. (R. 62); that "the cause was finally dismissed on motion of said defendants, Wirt Adams, State Revenue Agent, and the said Railroad Commission and their said clerk, to which dismissal the complainant excepted." R. 62.

These recitals are not supported by the Record—

1. The Railroad Commission and their clerk were not parties to this suit.

2. Paragraph 12 of the bill avers the assessment, but does not complain of it in any way. The right asserted by the bill was that of paying the taxes assessed by the affidavit under said 21st section to the sheriffs.

Upon this erroneous recital of the parties to and of the scope of the bill, the court below certifies:

"Now, therefore, it is certified that the question of the jurisdiction of this court was in issue in said cause upon the grounds hereinbefore stated, namely:

"1. That the complainant by its original bill showed no jurisdiction in this court because of the subject matter stated, inasmuch as the bill set forth no proper Federal question.

"2. That there was no jurisdiction in this matter, because the bill was a suit against the State of Mississippi, and in violation of the eleventh amendment to the Constitution of the United States."

That this certificate was given in conformity to the 5th section of the Act of Congress of the year 1891.

Thereupon appellees moved to dismiss or affirm this appeal. In aid thereof an affidavit of Wirt Adams, State Revenue Agent, is filed with this Record, showing that after the dismissal of said appeal by the Court of Appeals, and before

this appeal was taken, suit had been instituted in the Circuit Court of Hinds County, First Dist., State of Mississippi, a court having jurisdiction of the parties and subject matter, against appellant, to recover the identical taxes sought to be enjoined in this suit; that at the June Term, 1899, of said circuit court, final judgment was rendered against appellant therefor; and therefrom appellant appealed to the Supreme Court of the State, and that appeal is now pending. This judgment is relied on here as *res adjudicata*.

Appellants moved to dismiss or affirm, because: 1, it is an appeal in an injunction suit, and the purpose and object of said injunction bill and suit have failed, and the questions herein involved have become *res adjudicata;* and, 2, because this court has no jurisdiction of this appeal, or to affirm the decree, and that it is manifest if this court has jurisdiction the appeal is unnecessary and for delay; and, 3, because the questions on which jurisdiction depend are frivolous. This motion was duly served. (See Brief of R. C. Beckett.)

BRIEF.

I.

Jurisdiction.

This appeal is taken under the first clause of section 5 of the Judiciary Act of 1891, R. 57, "from the final decree refusing jurisdiction of this cause;" and "is granted solely upon the question of jurisdiction." R. 58. The certificate is that, 1, the "bill showed no jurisdiction in this court because of the subject matter stated, inasmuch as the bill set forth no proper Federal question;" 2, that there was no jurisdiction because the suit was against the State of Mississippi, contrary to the 11th Amendment of the Constitution of the United States, R. 62, and the only error assigned is that the court erred in dismissing the bill for want of jurisdiction. R. 57. The appeal should be dismissed, because,

1. The interlocutory decree of the circuit court refused the injunction and discharged the restraining order because "the complainant has shown no right to invoke the jurisdiction of this court, and further being of opinion that this court has no jurisdiction," R. 51; the motion to dismiss the bill was solely because the injunction had been refused, R. 56; therefore, the decision of the court below was upon the ground of want of equity, and the word "jurisdiction," as used in the decree, means jurisdiction in its general equity sense, and not that the decision was rendered upon the jurisdiction of the circuit court as a Federal Court. The appeal being under this certificate precludes inquiry here into any question except the exercise of the powers of the circuit court conferred by the Constitution and statutes of the United States; and, as the ground of the decision below did not rest upon this question, this court is without jurisdiction.

Smith v. *McKay*, 161 U. S. 355.
Blythe v. *Hinckley*, 173 U. S. 501.
Third Street v. *Lewis*, 173 U. S. 460.
U. S. v. *Swan*, 65 Fed. 649.
World's Col. Ex. v. *U. S.*, 56 Fed. 654.

There were numerous questions of general equity jurisdiction involved: 1. Whether the complainant's remedy was not by *certiorari* to reverse, if erroneous, the judgment of the Railroad Commission imposing the taxes notwithstanding the alleged exemption. 2. Whether the judgment of said commission was not *res adjudicata* of the matters of said alleged exemption; 3, whether the benefits of said 21st section passed to Louisville, New Orleans and Texas Ry. Co., under the deed authorized by the act of 1890, and whether the Lambert case was *res adjudicata* of that proposition. 4. Whether Lambert case was not *res adjudicata* of the question that the said 21st section was not an exemption from taxation, and not a contract of appropriation as averred. 5. Whether there was any consideration for the grant of said 21st section. 6. Whether the benefits of sec. 21 were lost under the consolidation of 1892 under Const. 1890, secs. 180, 181. 7. Whether after the answers of the sheriffs denying that they had taken or intended to take any steps by seizure and sale, or in any other way to enforce the said assessment of taxes, a court of equity would enjoin the revenue agent from bringing one suit to enforce the judgment evidenced by this assessment. 8. Whether the amount of taxes for 1898 had been paid by payment of construction debts. 9. Whether, as averred, the assessment is a cloud on title. 10. Whether this suit would avoid a multiplicity of suits. 11. Whether the Lambert case was *res adjudicata* as to the effect of the deed of consolidation of 1892, etc., etc.

2. The recitals of the questions arising upon the record, and upon which the certificate is based, do not state the case made by the bill, in this; the bill proceeds upon the theory that a legal assessment of the taxes of 1898 had been made by the Railroad Commission (XII) and that appellant had the right to pay these taxes under said 21st section by payment of construction debts, and an affidavit to that effect, and the gravamen of complaint was that the several sheriffs in violation of appellant's contract rights under said 21st section, had refused to accept the affidavit and execute the receipt in payment, and were threatening to seize appellant's property to enforce pay-

ment in money; and that Wirt Adams, State Revenue Agent, threatened to sue to recover the said taxes in money, in violation of sec. 10, Art. I, of the Constitution of the United States. The recitals as the predicate for the certificate state that the Railroad Commission and Adams, State Revenue Agent, are proceeding to assess said property for the taxes of 1898, under subsequent statutes, and to enforce this assessment by distress and by suit, contrary to said sec. 10, Art. I. The case made by the bill is that of a valid assessment by the Railroad Commission, and the alleged unlawful acts by the sheriffs in refusing to accept said affidavits in payment, and the threat to distrain, and, also, a threatened suit by Wirt Adams, State Revenue Agent, to recover these taxes; the case made by the recitals is that of an unlawful assessment by the Railroad Commission, and the threat of the Railroad Commission to enforce the assessment by distress, and the threat of Adams, State Revenue Agent, to sue to recover the assessment. The Railroad Commission and their clerk, the actors of the said recitals against whom, with Adams, an injunction was sought, were not parties to the suit. Hence, the certificate of the question of jurisdiction by the circuit court is founded upon the mistaken recitals as to what the case really was, and, as stated by the Record, does not certify the questions of jurisdiction involved.

3. The certificate is fatally defective.

1. It does not certify that the court decided the case on the question of the jurisdiction of the court as a Federal Court, but only that questions of jurisdiction were in issue.

2. It does not explicitly state what the precise questions of jurisdiction for decisions are; it leaves this court to search through the Record to find, if possible, what question of jurisdiction was decided by the court below, how it arose, and what effect other questions, not in their nature jurisdictional within the meaning of said sec. 5, had upon the decision of the case.

Maynard v. *Hecht*, 151 U. S. 326–7–8.

4. This appeal is *by certificate* under paragraph 1 of sec. 5, judiciary act 1891, 26 U. S. st. 827, and that cannot embrace the constitutional questions under paragraphs 4 and 6 of said judiciary act, and this even though certified, because the statute does not contemplate that such constitutional questions should be brought here by certificate.

5. The Court of Appeals was vested with jurisdiction under sec. 6 to hear and determine all questions of equity jurisdiction proper, and this jurisdiction attaches under the act of 1891 upon appeals from interlocutory decrees granting or refusing injunctions.

Smith v. *McKay*, 161 U. S. 357–8.

6. If the jurisdiction of the court is involved, the party "must elect whether he will take his writ of error or appeal to the Supreme Court upon the question of jurisdiction alone, or to the Circuit Court of Appeals on the whole case. If the latter, then the Circuit Court of Appeals may, if it deem proper, certify the question of jurisdiction."

McLish v. *Roff*, 141 U. S. 661.
Maynard v. *Hecht*, 151 U. S. 324.
U. S. v. *Jahn*, 155 U. S. 109.
In re Lehigh Co., 156 U. S. 326.
Calvin v. *City of Jacksonville*, 157 U. S. 368.

7. By the appeal to the Circuit Court of Appeals from the interlocutory decree refusing the injunction, the *whole case* and every question involved in the final decree were necessarily presented for decision. In such case the interlocutory decree is essentially the final decree.

Smith v. *Walker*, 57 Mich. 456.
Toledo v. *Detroit*, 61 Mich. 9.
Englewood Con. Co. v. *Chicago R. R. Co.*, 117 Ill. 611.

The bill was dismissed here solely because the court had rendered the interlocutory decree, refusing the injunction.

In the Court of Appeals the merits of the *whole case* "on bill and proofs" were drawn in question by the assignment of error. R. 53. That court, after a full hearing, *of its own*

motion, dismissed the appeal. 93 Fed. Rep. 852. This carried the "whole case" to the Court of Appeals, *upon the law and the facts*, for review.

Maynard v. *Hecht*, 151 U. S. 326–7.
Lake Nat. Bank v. *Wolfeborough*, 78 Fed. 517.

8. By this appeal upon the "whole case" to the Court of Appeals, the appellant *made an election*, within the meaning of the statute, to invoke the jurisdiction of that court, and it cannot now resort to this certificate of jurisdiction.

McLish v. *Roff*, 141 U. S. 668.
Maynard v. *Hecht*, 151 U. S. 326.
Smith v. *Vulcan Iron Works*, 165 U. S. 518.
Kirwan v. *Murphy*, 170 U. S. 209.

9. With all deference to the Court of Appeals we respectfully submit that when appellant took the appeal from the interlocutory—really final—decree, that court had jurisdiction of the "whole case," and that its powers were full to decide the entire controversy, with the advice of this court upon questions of jurisdiction of the Federal Court as such if it deemed proper to certify them.

1. Because the Record presents questions of general equity jurisprudence, and other than those of the jurisdiction of the court as a Federal court, and of the construction and application of the Constitution of the United States for decision, the decree deciding that "the complainant has shown no right to invoke the jurisdiction of this court," R. 51, and these questions of equitable cognizance are *in limine*.

Maynard v. *Hecht*, 151 U. S. 324.
Green v. *Mills*, 69 Fed. 852.
Coler v. *Granger Co.*, 74 Fed. 16.
Crabtree v. *Madden*, 54 Fed. 426.
Rust v. *United Waterworks Co.*, 70 Fed. 129.
City of Indianapolis v. *Cen. Trust Co.*, 83 Fed. 529.

In Green v. Mills, 69 Fed., *supra*, it was held, the Chief Justice delivering the opinion, where the jurisdiction rested on a Federal question, viz., the validity of State laws chal-

lenged as violating the Federal Constitution, but conceding the jurisdiction, the question at the threshold was one of equitable cognizance, that the Court of Appeals had jurisdiction—and this whether the dismissal was on that ground or not. In such case the Court of Appeals should take jurisdiction of the "whole case."

Smith v. *Vulcan Iron Works*, 165 U. S. 518.
Kirwan v. *Murphy*, 170 U. S. 209.
Lake Nat. Bank v. *Wolfeborough*, 78 Fed. 517.

2. Because, where the validity of a State statute is to be determined by a construction of the State Constitution, and then the contract clause of the Federal Constitution might be involved, the Court of Appeals has jurisdiction.

City of Indianapolis v. *Cen. Trust Co.*, 83 Fed. 529.

1. The validity of the said 21st section, under Art. XII, secs. 13 and 20, of the Constitution of Mississippi of 1869, lies at the foundation of the case. Said section 13 ordains: "The property of all corporations for pecuniary profits shall be subject to taxation, the same as that of individuals." And said section 20 ordains: "Taxation shall be equal and uniform throughout the State. All property shall be taxed in proportion to its value, to be ascertained as directed by law." Construing these provisions in other Constitutions, this court has held that their proper interpretation is that the taxation of corporate property is mandatory upon the Legislature, and that special exemptions cannot be granted.

Louisville v. *Palmes*, 109 U. S. 248.
St. Louis v. *Berry*, 113 U. S. 475.
Schurz v. *Cook*, 148 U. S. 408.
Keokuk v. *Missouri*, 152 U. S. 310–12.

In Yazoo & Mississippi Valley R. R. Co. v. Wirt Adams, State Revenue Agent, here on writ of error, and numbered 244 on the docket of October term, 1899, of this court, and wherein, p. 638, will be found the masterly opinion of Mr. Justice Whitfield, the same construction was placed upon said provisions as is held by this court. Said opinion of Justice Whitfield construing appellant's claim of immunity from tax-

ation for the years 1892–1897, inclusive, under said 21st section, declares that it violates said secs. 13 and 20, and that it was void *ab initio*. Therefore, the question arising under the State Constitution of 1869, in force when said 21st section was enacted, must first be decided before any Federal question can arise.

2. The bill avers this essential matter: That defendants claim that said contract of exemption under said 21st section was lost and waived by the consolidation, under their charters, of Louisville, New Orleans & Texas Ry. Co. and Yazoo & Miss. Valley R. R. Co. of October 24, 1892. This complainant denies as a fact, and avers (1) that the effect of said consolidation became *res adjudicata* by Lambert's case, 70 Miss. 779, by its interpretation of secs. 180 and 181 of the Constitution of the State of Mississippi (R. 10–11); (2) that the benefit of said 21st section was not lost by the effect of said secs. 180 and 181, Const. 1890, and that if such was the effect of said secs. 180 and 181 they would violate sec. 10, Art. I, of the Constitution of the United States. R. 11–12. Therefore, precedent to any question under the Federal Constitution arising these questions must be determined: (1) What, in fact, was done in said consolidation of October 24, 1892? If, as decided by Yazoo & Mississippi Valley R. R. Co. v. Wirt Adams, State Revenue Agent, No. 244, a new company was formed, then the Constitution of 1890 would subject appellant's railroad to taxation. (2) Was the Lambert case *res adjudicata* of the effect of said Constitution of 1890 upon said consolidation? Whether a decision is *res adjudicata* presents no Federal question. *San Francisco* v. *Itsell*, 133 U. S. 65; *Henderson Bridge Co.* v. *Henderson*, 173 U. S. 608. (3) What effect did the Constitution of 1890 have upon the powers of consolidation contained in the charters of Louisville, New Orleans & Texas Ry. Co. and Yazoo & Mississippi R. R. Co.? The said decision in Yazoo & Mississippi Valley R. R. Co. v. Wirt Adams, State Revenue Agent, No. 244, held that under the said sec. 180 the powers of consolidation, unexecuted at the promulgation of the Constitution in November, 1890, could not thereafter be executed so as to confer the immunity from taxation contained in said

21st section, if then existent, upon the consolidated company, Yazoo & Mississippi Valley R. R. Co.

It would be necessary to interpret said sections 180 and 181 of said State Constitution in their effect upon the then existing powers of consolidation before the Federal question could possibly arise.

No Federal question could arise on this point, for it is settled that an unexecuted power of consolidation is a mere license, revocable at will at any time before its exercise, and that such revocation does not impair the obligation of the contract.

Galveston Ry. Co. v. *Texas*, 170 U. S. 226.

3. An essential averment of the bill is that the defendants claim that the said 21st section was repealed by the acts of 1886 and Code of 1892; this repeal is denied and the legislative power to repeal is denied; so, the proper construction of said sections 13 and 20, Art. XII, Const. 1869, must first be determined; for if the power to repeal existed and was exercised no Federal question could arise. In said Yazoo and Miss. Valley R. R. Co. v. Adams, State Revenue Agent, No. 244, it was held that the power to repeal existed and that it was exercised by the act of 1886, and, if said immunity was then existent, by the Code of 1892.

Therefore, the Circuit Court of Appeals had jurisdiction of the whole case.

10. If the Court of Appeals with the whole case before it deemed the question of jurisdiction a controlling one, the proceedings could have been suspended and the question of jurisdiction could have been certified here for instruction.

U. S. v. *Jahn*, 155 U. S. 109, 114.

New Orleans v. *Benjamin*, 153 U. S. 411.

11. The effect of the dismissal of the appeal by the Court of Appeals, left adjudged by the decree of the circuit court every question within the appellate jurisdiction of the Court of Appeals presented by the record. And, also, it adjudged that it did not elect to certify the question of jurisdiction to this

court. The sole remedy of appellant to avoid this result was to have removed the cause by certiorari to this court from the decree of the Court of Appeals dismissing the appeal.

Law Ow Bew v. *U. S.*, 144 U. S. 57.

This appeal on certificate of jurisdiction is in effect a collateral attack upon this adjudication of the Court of Appeals.

Dowell v. *Applegate*, 152 U. S. 327.

Franklin v. *German Bank*, 142 U. S. 93.

12. Jurisdiction was conferred by statute upon the chancery court to enjoin the collection of taxes not authorized by law, Code 1892, sec. 483; and if this statutory jurisdiction is a part of the equity jurisprudence of the Federal Court it will be enforced in the Circuit Court of the United States: *Cummings* v. *Bank* 101, U. S. 157; and this question of jurisdiction would appertain to the Court of Appeals.

13. Each tax collector having denied by answer that he was proceeding, or intended to proceed, or had threatened to proceed, to enforce the assessment, the injunction could not issue to restrain him; and the restraining order should have been discharged.

3 *Daniel Chan. Pr.* 1831 *and notes.*

1 *Beach Inj.* secs. 305-6.

14. When the bill was filed the State Revenue Agent was the only defendant who was threatening to enforce the assessment; and the only remedy allowed to him by law was to sue in the proper court to recover "past due and unpaid taxes" (sec. 2, Acts 1894, p. 29). To this suit each of said tax collectors was a necessary party defendant, for if the failure to collect the taxes was wilful the compensation of the revenue agent must be paid by them, Code 1892, sec. 4200.

15. Where the remedy at law is adequate, and a single action can be brought to recover back the entire claim, equity has no jurisdiction.

Shelton v. *Platt*, 139 U. S. 595.

The several sheriffs by answer having denied that they were enforcing or intended to enforce the assessment by distress,

the suit by the State Revenue Agent would be the only suit threatened, and in this suit, if brought, every available defense could be made. "It is enough for the present purpose that the State courts had concurrent jurisdiction with the circuit courts of the United States, to pass on the Federal questions thus intimated; for the Constitution, laws and treaties of the United States are as much a part of the laws of every other State as its own local laws and Constitution, and if the State courts erred in judgment, it was mere error, and not to be corrected through the medium of bills such as those under consideration." *Blythe* v. *Hinckley*, 173 U. S. 508.

If the suit by the State Revenue Agent had been brought, equity would not enjoin because, as averred in the bill, there is a complete defense.

Hapgood v. *Hewitt*, 119 U. S. 226.

In *Shelton* v. *Platt supra*, it is held that while an unconstitutional tax may confer no right, impose no duty and support no obligation, the trespass resulting from proceedings to collect such void tax cannot be restrained by injunction where irreparable injury or other ground for equitable interposition is not shown to exist; and citing this from Cooley on Taxation: "When a tax is imposed as a personal charge against the party taxed or against his personal property it is difficult to suggest any ground of equitable jurisdiction." Id. 595.

The tax assessed against appellant was a personal liability. Sec. 3747, Code 1892, provides that "every lawful tax imposed * * * is a debt due by the person or corporation upon which the tax is imposed * * and may be recovered by action."

It was to be recovered in a single action by the State Revenue Agent. Act 1894, sec. 2, p. 29.

Yazoo & Miss. Valley R. R. Co. v. *Wirt Adams, State Revenue Agent*, No. 244.

16. The Railroad Commission, as State railroad assessors, in making the assessment had jurisdiction of the subject matter and of the appellant, and acted judicially.

Yazoo & Miss. Valley R. R. Co. v. *Adams*, 73 Miss. 648.

Supreme Court decided March 27, 1899, Mississippi Decisions 155, and it was held in the last opinion, that the provisions of the Code of 1892, and of the act of 1894 entitled "an act to provide for the election of a State Revenue Agent, to prescribe his powers and duties, and to repeal sections 4187, 4190, 4192, 4193 and 4195 in Chapter 126 of the Annotated Code of Mississippi, Acts 1894, p. 29, in regard to the assessment of railroads for taxation, were constitutional, and that the proceedings of the Railroad Commission thereunder were judicial proceedings, and that the finding of the Commission that the property was "liable to taxation," was conclusive upon the question of immunity from taxation, and that its judgment could not be enjoined except for fraud. Citing *Adams Ex. Co.* v. *Ohio*, 165 U. S. 229; *Railway Co.* v. *Backus*, 133 Ind. 541; *Louisville Water Co.* v. *Clark*, 94 Ky. 47; *Stanley* v. *Supervisors*, 121 U. S. 550; *Williams* v. *Supervisors*, 122 U. S. 154; *Winona* v. *Minn.*, 159 U. S. 534; *Fallbrook* v. *Bradley*, 164 U. S. 167; *Throop Pub. Officers* § 541; 2 *Desty Tax.* 625 and note (2); *Burroughs Tax.* § 102; *Palmer* v. *Mahon*, 135 U. S. 665; *Railway* v. *Backus*, 154 U. S. 427.

This construction of the scope of the judicial proceedings furnished by these statutes by the Supreme Court of the State will be followed by this court.

Forsyth v. *Hammond*, 166 U. S. 516–18–19–20.
Backus v. *Fort Street Depot Co.*, 169 U. S. 559.
Covington v. *Kentucky*, 173 U. S. 231.
Henderson Bridge Co. v. *Henderson*, 173 U. S. 602.

17. With full opportunity for defense before the Railroad Commission, the appellant, after adverse decision, abandoned the forum organized to decide exclusively what property is "liable to taxation," and by this bill seeks to resort to an injunction in the Federal Court. This cannot be done.

Albuquerque v. *Perea*, 147 U. S. 582.
Walston v. *Nevin*, 128 U. S. 582.
Forsyth v. *Hammond*, 166 U. S. 519–20.
Blythe v. *Hinckley*, 173 U. S. 508.

18. Whether the Lambert case, 70 Miss. 779, was *res adjudi-*

cata, as averred, was a question of general equity jurisprudence and involved no Federal question.

San Francisco v. *Itsell*, 133 U. S. 65.
Henderson Bridge Co. v. *Henderson*, 173 U. S. 608.

Constitutionality of 21st Section.

If said 21st section was void *ab initio* because in violation of the State Constitution; or, if its benefits were lost to appellant subsequently under the Constitution of 1890, then, under the declaration of the decree that complainant has shown no right to invoke the jurisdiction of the court, the question of jurisdiction certified cannot arise. As a predicate of invoking the jurisdiction there must exist a contract the obligation of which has been impaired.

Section 21 violates the Constitution of 1869.

1. Art. XII, sec. 13, Const. 1869, ordains: "The property of all corporations for pecuniary profits shall be subject to taxation the same as that of individuals;" and sec. 20 ordains: "Taxation shall be equal and uniform throughout the State. All property shall be taxed in proportion to its value, to be ascertained as directed by law."

Under these provisions the Supreme Court of the State held in Yazoo and Miss. Valley R. R. Co. v. Wirt Adams, State Revenue Agent No. 244, that this 21st section was unconstitutional and void. This ruling is in accord with *Louisville v. Palmes*, 109 U. S. 248; *St. Louis* v. *Berry*, 113 U. S. 475; *Schurz* v. *Cooke*, 148 U. S. 408; *Keokuk* v. *Missouri*, 152 U. S. 310-12.

No matter what the former opinions of the Supreme Court of Mississippi may have been, as this latest decision of that court is in harmony with the decisions of this court, and as this appeal comes directly from the Federal Court, this court will follow its own decisions in the interpretation of the provisions of the State Constitution.

Citizens Savings Bank v. *Owensboro*, 173 U. S. 643.
U. S. v. *Morrison*, 4 Pet. 124.
Green v. *Neal*, 6 Pet. 129.
Leffingwell v. *Warren*, 2 Black 509.

2. Was the benefit of said 21st section, if existent, lost to appellant by the consolidation in October 24, 1892, under the Constitution of 1890?

1. The charter of Natchez, Jackson & Columbus R. R. Co. was granted in 1870, and, by a subsequent act, in 1870, the said 21st section was extended to it. In 1878 the said 21st section was again extended to Natchez, Jackson & Columbus R. R. Co. Without reference to repealing statutes, and following the bill, the benefits of said section were sold by Natchez, Jackson & Columbus R. R. Co., under the act of 1890, to Louisville, New Orleans & Texas Ry. Co. with its railroad property.

The Louisville, New Orleans & Texas Ry. Co. was formed by consolidation, under the act of 1882, as amended by the act of 1884, and was composed of Vicksburg & Memphis R. R. Co., a Mississippi corporation, chartered in 1870, and New Orleans, Baton Rouge, Vicksburg & Memphis R. R. Co., a Mississippi corporation, chartered in 1882, with a Tennessee and a Louisiana corporation. By said acts of 1882 and 1884 the said consolidated company was granted the said 21st section for the railroad of said consolidated company.

The railroad of Natchez, Jackson & Columbus R. R. Co. so purchased ran from Jackson to Natchez; the railroad of Louisville, New Orleans & Texas Ry. Co. ran from Memphis to New Orleans.

The bill avers that on October 24, 1892, Louisville, New Orleans & Texas Ry. Co. consolidated with and was merged into Yazoo & Mississippi Valley R. R. Co., under the powers of consolidation contained in their respective charters.

In 1890 a new constitution was promulgated, and by sec. 112 it was ordained: "Taxation shall be uniform and equal throughout the State. Property shall be taxed in proportion to its value. * * * Property shall be assessed for taxes under general laws, and by uniform rules, according to its true value. But the Legislature may provide for a special mode of valuation and assessment of railroads, and other corporate property, or for particular species of property belong-

ing to persons, corporations, or associations not situated wholly in one county. But all such property shall be assessed at its true value." And by secs. 181, 182 and 180, Art. VII:

"Sec. 181. The property of all private corporations for pecuniary gain shall be taxed in the same way and to the same extent as the property of individuals; but the Legislature may provide for the taxation of banks and banking capital by taxing shares according to the value thereof (augmented by the accumulations, surplus and unpaid dividends), exclusive of real estate, which shall be taxed as other real estate. Exemptions from taxation to which corporations are legally entitled at the adoption of this Constitution, shall remain in full force and effect for the time of such exemptions, as expressed in their respective charters, or by general laws, unless sooner repealed by the Legislature."

"Sec. 182. The power to tax corporations and their property shall never be surrendered or abridged by any contract or grant to which the State or any political subdivision thereof may be a party, except that the Legislature may grant exemption from taxation in the encouragement of manufactures and other new enterprises of public utility, extending for a period of not exceeding five years, the time of such exemption to commence from the date of charter, if to a corporation."

"Sec. 180. All existing charters or grants of corporate franchise under which organizations have not in good faith taken place at the adoption of this Constitution, shall be subject to the provisions of this article; and all such charters under which organizations shall not take place in good faith and business be commenced within one year from the adoption of this Constitution, shall thereafter have no validity."

The powers of consolidation under their respective charters of Louisville, New Orleans & Texas Ry. Co. and Yazoo & Mississippi Valley R. R. Co. were unexercised in 1890 at the date of this Constitution. That Constitution required railroad property to be taxed in every instance where the company should be formed after it took effect. This unexercised power was a mere license, and there had been no organization thereunder at the date of the adoption of that Constitution. Con-

struing the charter powers of consolidation and what was done under them in this consolidation of October 24, 1892, the Supreme Court of Mississippi, in said decision in Yazoo & Mississippi Valley R. R. Co. v. Wirt Adams, State Revenue Agent, No. 244, upon a full review of all the Federal and State jurisprudence on the subject, held that by said consolidation, under said sec. 180, Const. 1890, the said exemption was lost. We refer the court to the exhaustive opinion of Mr. Justice Whitfield in that case for a demonstration of this proposition.

2. But it is averred in the bill that the Lambert case, 70 Miss. 779, is *res adjudicata* of the proposition that said consolidation did not have the effect to waive said 21st section. To meet this averment the Record in the Lambert case was read in evidence, R. 31, 20, 70 Miss. 779, from which it appears that the decree of *res adjudicata* relied on is one of reversal on an appeal sustaining a demurrer to the bill. The bill in that case asserts no right under the Constitution of 1869 or of 1890, and the demurrer does not challenge the bill on the ground of the unconstitutionality of said 21st section, nor of the waiver thereof by said consolidation under sec. 180, Const. 1890. R. 50–1. In said decision in No. 244, supra, the Supreme Court finds as a fact and holds:

1. That the Lambert case held said 21st section to be an exemption from taxation, and not a "contract of appropriation."

2. That the constitutionality of said 21st section under the Constitution of 1869 was not decided.

3. That sec. 180, Const. 1890, in its effect upon said consolidation of October 24, 1892, was not drawn in question.

4. That said Lambert case was *res adjudicata* only for the taxes of 1891 and 1892 on that part of the railroad formerly belonging to Natchez, Jackson and Columbus R. R. Co., situate within Adams county, and upon no other part thereof and for no other year.

The allegation of the bill that said 21st section was more

than an exemption and was a "contract of appropriation" and as such was protected by the Federal Constitution is not *res nova*. The bill in *Miss. Mills* v. *Cook*, 56 Miss 40, R. 25–6, and in Lambert's case, R. 37, averred this 21st section to be a contract of appropriation, but the court in *Miss. Mills* v. *Cook* treats it as an exemption, and in Lambert's case, where the effect of the demurrer was to challenge that construction of sec. 21, the court expressly decides that it was an exemption, a mere grace, repealable at the will of the Legislature.

Exemption—Repeal.

If the said 21st section was repealable, and was repealed, then there was no contract the obligation of which could be impaired, and therefore the question of jurisdiction of the court as a Federal Court would not arise.

Did any contract of immunity from taxation exist within the meaning of the Federal Constitution? And if so, was it repealed prior to 1898?

The bill is predicated upon the existence in 1898 of an exemption from taxation: first, as to the property formerly belonging to Natchez, Jackson & Columbus R. R. Co., under said 21st section; second, as to the property formerly belonging to Louisville, New Orleans & Texas Ry. Co., through sec. 5 of the acts of 1882 and 1884, extending said 21st section to Louisville, New Orleans & Texas Ry. Co.

1. First as to exemption claimed through Natchez, Jackson & Columbus R. R. Co.

This railroad was chartered July 21, 1870, Acts 1870, pp. 221–233, and its original charter contained no exemption. Sec. 26 of its charter provided: "And the rights, power and authority granted in and by this act of incorporation shall be perpetual, except that the same may be altered or amended as necessity may require." Therefore its provisions were subject to the power of repeal.

This charter of Natchez, Jackson & Columbus R. R. Co. was granted subject to the provisions of Art. XII, secs. 13 and 20, of the Constitution of 1869—viz.: "The property of

all corporations for pecuniary profits shall be subject to taxation the same as that of individuals." "Taxation shall be equal and uniform throughout the State. All property shall be taxed in proportion to its value, to be ascertained as directed by law."

Said 21st section was extended to Natchez, Jackson & Columbus R. R. Co. by an amendment to its charter approved August 8, 1870.

By the Code of 1871, sec. 1662, it was declared: "The following property, and no other, shall be exempt from taxation, towit:" specifying, but not including railroads.

There was no special mention made of railroads in the revenue chapter 22, Code 1871, as subject or not to taxation; but it provided that "all incorporated banks or other companies liable to taxation on their capital stock shall be assessed," etc. Sec. 1668.

By sec. 1747, chap. 22, Code 1871, a privilege tax was imposed upon express, telegraph and insurance companies, but none upon railroads.

In 1875, Acts 1875, p. 66, "An act to regulate railroad taxation" was passed, whereby it was provided: "That every railroad company, whose line is in whole or in part in this State, shall pay to the State Treasurer * * * in each and every year, a privilege tax as follows, * * * and the said privilege tax shall be in full of all other taxes, State, county and municipal, due from such company, or for which such company or its property could, but for the passage of this act, be made in any manner liable; * * * Provided, That lands owned by railroad companies, and not acquired and used in operating railroads, shall be taxable as other property."

This act was construed in Lambert's case to repeal the exemption of the Natchez, Jackson & Columbus R. R. Co. 70 Miss. 787. This was a *general* taxing statute.

In 1878 an act was passed, Acts 1878, page 233, approved March 5, 1878, in regard to the exemption of Natchez, Jack-

son & Columbus R. R. Co., reciting that 30 miles of the road had been built, and that the said act of 1870, extending said 21st section to Natchez, Jackson & Columbus R. R. Co., was not approved until after the adjournment of the Legislature, and that it was not passed upon an aye and nay vote; and it then again extends said 21st section to said Natchez, Jackson & Columbus R. R. Co. as to future and past taxes. This was a *special* act.

By a general act of 1878, approved the same day as the last named special act, Acts 1878, p. 87, the said general act of 1875 was amended so as to provide: "That every railroad company whose line is in whole or in part in this State, shall pay to the State Treasurer * * * in each and every year, a privilege tax of $80 per mile, upon each of said roads and branch thereof, in this State, except that upon narrow gauge roads the privilege tax shall be but $40 per mile, and the said privilege tax shall be in full of all State, municipal and county taxes; fifty *per cent.* of which said privilege tax shall be placed to the credit of the counties through which said railroad may pass, to be drawn by the county treasurers of the counties in proportion to the number of miles of said roads in said respective counties: *Provided*, That lands owned by railroad companies, and not used in operating the railroads, shall be taxable as other property; and that this act shall not apply to the West Feliciana Railroad. Sec. 2. That this act take effect and be in force from and after its passage."

By this act it is clear that railroad property was selected for taxation and subjected to taxation. On the day of the approval of the foregoing general act, as stated, under guise of a defective enactment, a special act was approved whereby said sec. 21 was "made to apply to Natchez, Jackson & Columbus R. R. Co., etc." * * * "And that all taxes, State, county and municipal, which have heretofore * * * been assessed against said company, or assessed or levied on its property, be and the same are hereby appropriated and set apart, and shall be applied" as provided in sec. 21, Acts 1878, p. 233.

The bill in Mills v. Cook, 56 Miss. 45, was filed January 4, 1878, and on March 12, 1878, R. 20, the chancery court dis-

missed the bill, and thereby held that the Legislature had the power to repeal the exemption. In April, 1878, the Supreme Court held in that case that while the Legislature had power to exempt a *general* class, still that all classes of property selected for taxation must be taxed alike. So, concurrently with the re-enactment of sec. 21, in 1878, there was a tax imposed by *general act* on railroad property, and a judicial interpretation rendered, that all property of corporations and individuals selected for taxation must be taxed alike. Hence, the act of 1878 re-enacting sec. 21 was unconstitutional and void under Mills v. Cook. There was, therefore, no exemption in effect in 1880.

Code 1880, chap. 10, sec. 597, provided that "each railroad company owning and operating a railroad in this State shall * * in each year, file with the auditor * * a complete schedule of all its property, real or personal," specifying length of road, switches, capital stock, bonded indebtedness, etc., etc. Sec. 599 provides that the governor, auditor and secretary of state "shall * * assess the value of each railroad for the purposes of taxation," etc. "Sec. 604. The taxes so assessed in behalf of the State shall be due as other taxes, and if the same be not paid to the auditor * * within the time allowed other taxpayers, he shall proceed to collect the same by distress." "Sec. 605. The collector of taxes for any county shall collect the amount due the county, as is now provided by law in the case of delinquents." "Sec. 606. The property of any railroad company lying or being in any city or * * town may be taxed for city or town purposes, upon a valuation thereof made upon the same basis as the property belonging to individuals and no more, and this section shall apply alike to the foregoing and following modes of taxation herein provided for."

"HOW COMPANY RELIEVED FROM FOREGOING REQUIREMENTS."

"Sec. 607. Each and every railroad company which will accept this act, and annually pay to the auditor * * the taxes hereinafter provided for, and will signify their acceptance in writing shall be exempt (except from the last preceding section) from the provisions of the foregoing sections of

this act until otherwise ordered and provided by law, and the payment of the same shall be in full of all State and county taxes; * * *provided* that lands owned by railroad companies and not used in operating the railroads, shall be taxable as other property for all purposes."

"PRIVILEGE TAX ON EACH RAILROAD COMPANY."

"Sec. 608. Each railroad company whose line is in whole or in part in this State shall, if it accepts the provisions of this act, pay to the State treasurer * * in each and every year a privilege tax as follows, to-wit: Specifying the several roads, and the amount of privilege tax, and among those specified is "Natchez, Jackson and Columbus Railroad Company, thirty dollars per mile;" * * Provided that no railroad company shall be subject to taxation under this chapter while the same is in process of construction, but if any part of any road shall be finished and used for profit, the part so finished shall be taxed although the whole road may not be finished."

Sec. 468, Code 1880, of chapter 10, on public revenue, of which sections 597–608 are a part, provides: "The following property, and no other, shall be exempt from taxation, towit," specifying—but these do not include railroads; and the only exemption granted railroads is to those under process of construction under secs 608, Code 1880.

The Code 1880 changes the act of 1878 supra, in that there the privilege tax was imposed primarily as a commutation tax; by the Code *ad valorem* taxes were primarily imposed; and to those companies that would accept, *in writing*, the provisions of chapter 10, the right was given of paying a privilege tax in lieu of State and county taxes on the railroad proper, but all municipal taxes and taxes on outlying lands had to be paid *ad valorem*.

Code 1880, sec. 3, provides: * * "All acts and parts of acts, the subjects of which are revised, consolidated and reenacted by this revised code, or repugnant to any of the provisions contained therein, shall be, and the same are hereby repealed, subject, however, to any express regulation relating

thereto, which may be contained in this Code." And sec. 8: "No private act, or act of local application, not revised or brought into this Code, shall be affected by its provisions."

The subject of railroad taxation is "revised, consolidated and re-enacted" by the Code, and "each railroad" is required to pay *ad valorem* taxes, except that if it will accept the provisions of the act, in writing—that is, thereby indicating their election to pay privilege instead of *ad valorem* taxes, they may pay privilege taxes; and the Natchez, Jackson & Columbus R. R. Co. is *expressly named* as one of the companies that may pay the privilege instead of *ad valorem* taxes.

Therefore, as correctly held in Lambert's case (the author of the Code of 1880 delivering the opinion) and in Y. & M. V. R. R. Co., v. Adams No. 244, the Code of 1880 repealed the exemption of Natchez, Jackson & Columbus R. R. Co.

The general act of 1884 (p. 29) entitled, "an act to amend sections 607 and 608 of Code of 1880, in relation to privilege tax on railroads, and for other purposes," provides: "that section 607 of the Code of 1880 be so amended as to read as follows," copying the exact language of section 607, and then adding these words: "Any exemptions in their charters to the contrary notwithstanding as to such lands. And said lands shall be listed by assessors, and taxes shall be collected by the sheriffs and paid into the State and county treasuries: *provided, further*, that the provisions of this act shall not have the effect to tax any of the lands of the Memphis & Vicksburg Railroad Company until the first day of February, 1886."

Section 2 reads exactly as section 608 of Code of 1880, except that the privilege tax is increased in amount and the specifications as to the N., J. & C. R. R. Co. is as follows: "The Natchez, Jackson and Columbus Railroad Company, forty dollars per mile after expiration of exemption as provided in its charter, and acts amendatory thereof." And adds to section 608 these words: "All the railroads not named herein and not exempt from taxation by their charter, sixty dollars per mile; *provided*, that no railroad company shall be subject to taxation under this chapter while the same is in

process of construction, but if any part of any road shall be finished and used for profit, the part so finished shall be taxed, although the whole road may not be finished, nor where the same is now exempt from taxation by its charter."

This act of 1884 was construed by Lambert's case to have restored the exemption repealed by the Code of 1880. In said No. 244, it was said that it was "doubtful" whether it was so restored.

Following the rule that exemptions are to be clearly and expressly granted, and that every presumption is against the grant, and that they cannot be extended beyond the express language of the grant (*Y. & M. V. R. R. Co.* v. *Thomas*, 65 Miss. 553, S. C. 132, U. S. 174; *State* v. *Simmons*, 70 Miss. 485), this statute cannot be said to create an exemption.

Applying this amendment to the Code sections it amends, we find that it does not purport to amend secs. 597–606 of Code imposing *ad valorem* taxes, but is confined to the amount of privilege tax the several roads are to pay. In that light the statutes would read that Natchez, Jackson & Columbus R. R. Co. must pay *ad valorem* taxes on the value of its road, unless that company will signify its acceptance of the act in writing and "pay to the State Treasurer, * * * in each and every year, a privilege tax, as follows: * * * The Natchez, Jackson & Columbus R. R. Co., "forty dollars per mile after expiration of exemption as provided for in its charter and acts amendatory thereof."

This would mean, strictly construed, that after the time—namely, thirty years from 1870—named in its amended charter, the N. J. & C. R. R. Co. should pay a privilege tax of forty dollars in lieu of *ad valorem* taxes; but the *ad valorem* taxes of secs. 597–606 are for every year *in presenti*, and not thirty years *in futuro*.

As there is no provision in the act of 1884 for a privilege tax on N. J. & C. R. R. Co. in lieu of *ad valorem* taxes of current years, but only for such privilege tax after thirty years from 1870, and as the act of 1884 only amends secs. 607 and

608 of Code of 1880, it would follow that no provision was made by the act of 1884 for the *ad valorem* tax of the N. J. & C. R. R. Co. for current years being commuted by a privilege tax.

If the words "after expiration of exemption as provided in its charter and acts amendatory thereof" should be construed as meaning that the Legislature assumed that the exemption then existed, and on this assumption provided the payment of the forty dollars privilege after its expiration, when in fact no such exemption then existed, it could not be held that it was the legislative intent to re-enact the exemption merely because it predicated the taking effect of the imposition of a tax at a future time upon this false assumption of fact.

Endlich Interpretation of Statutes, secs. 372–3–4.

There is no repealing clause to this act. It provides for amending secs. 707 and 708 of the Code so as to read as there provided. The necessary result of not providing, by the act of 1884, for a present privilege tax as commutation for present *ad valorem* taxes imposed by secs. 597–606, would be to leave the *ad valorem* taxes to stand and be exigible. The fact that provision is made for a privilege tax as commutation for *ad valorem* taxes imposed by secs. 597–606, *in futuro*, would be no modification of the statute imposing taxes *in presenti*.

When the Code of 1880 and the act of 1884 provided for *general* taxation of railroads under Constitution 1869, Art. XII, sec. 13 (as interpreted in Mills v. Cook), all railroad property must be taxed, and the attempted restoration of *special exemption* to N. J. & C. R. R. Co. by the act of 1884 would have been unconstitutional.

But if the act of 1884 re-enacted the exemption by providing that the time of payment of the privilege tax should not commence until after the expiration of the time granted by the charter, the general tax act of 1886, p. 23, repealed the exemption. Sec. 3 provides: * * * "and hereafter all the railroads in this State shall pay the privilege taxes assessed against them under all the pains and penalties prescribed in sec. 589 of the Code of 1880;" and by sec. 6 it is provided:

"That the act entitled 'An Act to Amend secs. 607 and 608 of the Code of 1880, in Relation to Privilege Taxes on Railroads, Approved March 3, 1884,' be so amended as to fix the amount of privilege tax to be paid by the several railroad companies mentioned and referred to in said act at sums 25 per centum greater respectively than the sums mentioned in said act; and hereafter said railroad companies shall pay privilege taxes respectively 25 per cent. greater per mile than as fixed in said act."

This act was an amendment to the act of 1884; the Natchez, Jackson & Columbus R. R. Co. was mentioned in said act; a privilege tax is imposed *in presenti* of 25 per cent. more than the sums mentioned in said act; "and *hereafter said* railroad companies," i. e., those "mentioned and referred to" in said act of 1884, "shall pay privilege taxes," etc. Not thirty years hence, but "hereafter," i. e., after the passage of this act. There is not a squint at any exemption being further continued. Therefore, the Supreme Court of Mississippi correctly held in said No. 244 that this act of 1886 repealed any exemption created before that time.

In 1890 a general taxing act was passed, entitled, "An Act to Amend the Revenue Laws," Acts 1890, p. 6, which, after prescribing general privilege taxes, by sec. 5, provides: "That sec. 1 of the act of March 12, 1884, relating to railroad privilege taxes be amended by striking out the last proviso thereof, and that the same be re-enacted as amended. That sec. 2 of said act of March 12, 1884, be amended by striking out all after the word "towit," in line 9, and inserting the following:

The Alabama Great Southern, per mile.	$150 00
* * * * * * * * *	
The Natchez, Jackson & Columbus, per mile. . .	50 00
* * * * * * * * *	
The Yazoo & Mississippi Valley, per mile. . . .	100 00
* * * * * * * * *	
The Mobile and Northwestern, per mile.	150 00
And all other roads constructed and to be constructed, per mile.	100 00

Provided no railroad shall be subjected to taxation while

exempt by its charter, nor while the same is in process of construction, or within one year after completion, but such exemption shall not be for more than three years from the date the first rails are laid, and if any part thereof shall be finished and used for profit after such time, the same so used shall be taxed," etc.

In Lambert's case it was held that this act recognized the exemption if then in existence; but it did not hold that it created anew the exemption.

By this act taxes were imposed on railroads; that class of property was selected for taxation, and, when this was done, under secs. 13 and 20, article 12, Constitution 1869, it would be an unconstitutional exercise of authority to exempt any railroad therefrom. The body of this act imposes taxation on railroads, but the proviso by declaring that "no railroad shall be subjected to taxation while exempt by its charter" is an attempted legislative repeal of sec. 13, article 12, declaring that all property shall be subject to taxation, and of sec. 20, that taxation shall be equal and uniform. Under the rule of *Mills* v. *Cook*, 56 Miss. 40; *Lambert's Case*, 70 Miss. 779; *Worrell* v. *Vicksburg Bank*, 67 Miss. 47, and of *Adams* v. *Miss. Bank*, 75 Miss. 701, this proviso would be unconstitutional if it created anew an exemption.

The true construction of said secs. 13 and 20, article 12, Constitution 1869, is that adopted by the court in said No. 244, following the decisions of this court, in *Louisville* v. *Palmes*, 109 U. S. 248; *St. Louis* v. *Berry*, 113 U. S. 475; *Schurz* v. *Cook*, 148 U. S. 408; *Keokuk* v. *Missouri*, 152 U. S. 310–12, whereby it is declared that these provisions are mandatory upon the Legislature and deprive it of the power to exempt from taxation.

The rule is settled that this court will interpret for itself the contract, *Dennis* v. *V. S. & P. R. R. Co.*, 116 U. S. 665, and in so doing it will find that under its own decisions, now concurred in by the State court, there never existed any legislative power to grant the exemption claimed. It follows, therefore, that when the Constitution of 1890 was framed there

was no existent exemption from taxation in Natchez, Jackson & Columbus R. R. Co., or in Louisville, New Orleans & Texas Ry. Co. as the grantee of its property, franchises and immunities.

Exemption of L. N. O. & T. Ry. Co.

2. Let us now trace the exemption claimed under sec. 5 of the acts of 1882 and 1884 as applied to the consolidated corporation, Louisville, New Orleans & Texas Ry. Co.

The constituent companies of the Louisville, New Orleans & Texas Ry. Co. were New Orleans, Baton Rouge, Vicksburg & Memphis R. R. Co., whose charter was granted in 1882, and which contained, as granted, no exemption, and Memphis & Vicksburg R. R. Co., granted in 1870, and to which said 21st section was extended by the said act of August 8, 1870.

By said act of 1875, p. 66, and said act of 1878, p. 87, and by the Code of 1880, sections 597–606, it is indisputable that this exemption was repealed. The Memphis & Vicksburg R. R. Co. is not named in section 608, Code 1880, fixing a privilege tax in lieu of *ad valorem* taxes. There had at that time been nothing done under said Memphis & Vicksburg R. R. Co.'s charter.

By the Code of 1880, as shown, all railroad property was subject to *ad valorem* taxes. Railroad property was then selected for taxation, and under *Miss. Mills* v. *Cook*, *supra*, *Vicksburg Bank* v. *Worrell*, *supra*, Lambert's case, *supra*, whenever this was done sections 13 and 20, Art. XII, Constitution 1869, required all to be taxed alike.

General taxation of railroad property was the rule established by the Code of 1880.

In 1882, said section 5 was enacted, and by the said act of 1884 it was extended to the consolidated company *to be formed* by Memphis & Vicksburg R. R. Co. and the other consolidating companies. By this said *special exemption* was granted by *special act* to a *special* corporation, when by the Code of 1880 railroad property had been selected for taxation and so continued, as evidenced by the act of 1884 amending the Code of

1880 in this regard. Therefore, this *special* grant of an *irrepealable exemption* would be condemned as unconstitutional by Miss. Mills and Vicksburg Bank v. Worrell cases. The grant of the exemption was void *ab initio.*

Said general taxing act of 1884, approved March 12, amended said section 607, Code 1880, by adding these words: "Provided further, that the provisions of this act shall not have the effect to tax any of the lands of the Memphis & Vicksburg Railroad Company until the 1st day of February, 1886;" and amended by sec. 2, sec. 606, Code 1880, to read: "Each railroad whose line is in whole or in part in this State, shall, if it accepts the provisions of this act, pay to the State Treasurer, on the warrant of the Auditor, on or before the 15th day of December in each and every year, a privilege tax as follows: The Mobile & Ohio Railroad Company and branches, one hundred dollars per mile; the Chicago, St. Louis & New Orleans Railroad Company and branches, or the Illinois Central Railroad Company and branches, one hundred dollars per mile; the Memphis & Charleston Railroad Company, one hundred dollars per mile; the New Orleans, Mobile & Texas Railroad Company, or Louisville & Nashville Railroad Company, one hundred dollars per mile; the Mississippi & Tennessee Railroad Company, one hundred dollars per mile; the Alabama Central Railroad Company, one hundred dollars per mile; the Alabama Great Southern Railroad Company, one hundred dollars per mile; the Vicksburg & Meridian Railroad Company, eighty dollars per mile; the West Feliciana Railroad Company, thirty dollars per mile; the Grand Gulf and Port Gibson Railroad Company, thirty dollars per mile; the Mississippi Valley & Ship Island Railroad Company, forty dollars per mile; the Ship Island, Ripley & Kentucky Railroad Company, twenty-five dollars per mile; the Mobile & Northwestern Railroad Company, twenty dollars per mile; the Greenville, Columbus & Birmingham Railroad Company, forty dollars per mile; the Natchez, Jackson & Columbus Railroad Company, forty dollars per mile, after expiration of exemption as provided in its charter, and acts amendatory thereof. All railroads not named herein, and not exempt

from taxation by their charters, sixty dollars per mile; provided that no railroad company shall be subject to taxation under this chapter while the same is in process of construction, but if any part of the road shall be finished and used for profit, the part so finished shall be taxed, although the whole road may not be finished, nor where the same is now exempted from taxation by its charter."

It is clear that the proviso to sec. 1, *supra*, exempting *lands* of Memphis & Vicksburg R. R. Co. until February, 1886, was unconstitutional, because all other lands were taxed. Memphis & Vicksburg R. R. Co., and New Orleans, Baton Rouge, Vicksburg & Memphis R. R. Co. are not specifically mentioned in this sec. 2, and therefore, they, with their consolidation, Louisville, New Orleans & Texas Ry. Co., would come under the general clause of "all the railroads not named herein and not exempt by their charters, $60 per mile;" and that its exemption or not must be controlled by the application of the proviso to sec. 2 of said act.

The attempted grant of the exemption in 1882 and 1884 to the consolidated company, Louisville, New Orleans & Texas Ry. Co., was, as we have seen, unconstitutional and void, and hence, the privilege tax of $60 per mile in lieu of *ad valorem* taxes was imposed.

The said sec. 5 applied only to the consolidated company, and conferred no exemption upon the several constituent companies. This act imposing the taxes was approved March 12, 1884. The act authorizing consolidation was approved three days later, March 15, 1884. Interpreting the language *strictissimi juris*, it is clear that on March 12, 1884, Louisville, New Orleans & Texas Ry. Co., the consolidated road, was not within the exception of railroads "exempt from taxation by their charters," nor within that of the proviso, "where the same is *now* exempt from taxation by its charter." On March 12, 1884, there was no corporation in existence answering these terms. Three days later one was authorized to be created, and this power was exercised August 12, 1884. Therefore, it cannot be said, as was done in Lambert's case, with reference to this act of 1884 in reference to Natchez, Jackson & Columbus R. R. Co., that this act of 1884 "re-enacted the exemption."

If this general revenue act of 1884 did not preserve the exemption, then by it the tax would be expressly imposed. In this view the act of 1884, authorizing consolidation "with the rights, privileges and immunities in said act (1882) mentioned," would not be construed to create an exemption under sec. 5.

Covington v. *Kentucky*, 173 U. S. 231.

But if said section 5, with its *irrepealable* exemption, did operate to vest such exemption in Louisville, New Orleans & Texas Ry. Co. upon its creation, August 12, 1884, by said Code of 1880 and said general tax act of 1884, the Legislature selected railroads for taxation, and all railroads must then be taxed.

To create an irrepealable exemption as section 5 (21) attempts to do, would plainly violate said provisions of the Constitution of 1869.

The *general taxing act* of 1886, acts 1886, p. 23, amending the Code of 1880, distinctly imposes privilege taxes in lieu of *ad valorem* upon the railroads "mentioned and referred to" in said act of 1884. It is clear, as shown in reference to the N., J. & C. R. R. Co., and as held by the Supreme Court in said No. 244, that this act repealed the exemption, if then existent.

By the act of 1890, hereinbefore set forth, Louisville, New Orleans & Texas Ry. Co. was embraced in the general language: "And all other railroads constructed, or to be constructed, per mile, $100; provided no railroad shall be subjected to taxation while exempt by its charter," etc. This, as shown, *supra*, would not create an exemption; if it did it would be unconstitutional for the reasons heretofore set forth.

If there was any doubt under the Constitution of 1869, the Constitution of 1890 made it certain that all railroads should be taxed, and that, then, legally existing exemptions were repealable by the Legislature. Sections 112, 181, 182, Const. 1890. In *Adams* v. *Miss. State Bank*, 75 Miss., this Constitution was construed, and it was held that whenever a class of property was selected, all of that class must be taxed alike. The decisions of this court, followed by the State Supreme Court, in *Yazoo & Miss. Valley R. R. Co.* v. *Adams, State Revenue*

Agent, No. 244, held that taxation of all corporate property was mandatory.

In Lambert's case this clause of section 181, "Exemptions from taxation to which corporations are legally entitled at the adoption of this Constitution, shall remain in full force and effect for the time of such exemptions as expressed in their respective charters, or by general laws, unless sooner repealed by the Legislature," was disposed of by this language: "Sec. 181 of the Constitution has no effect as to the exemption claimed. It left the matter as if the Constitution had not been adopted. It let it alone, to rest upon legislation, unaffected by the fundamental law." P. 790.

The subject of the exemption of these companies from taxation had become parts of general laws on the subject of revenue prior to 1892.

In 1892 a new Code was enacted, providing by sec. 3875 that "each railroad company owning and operating a railroad, shall, on or before the first Monday of April each year, file with the railroad commission a complete schedule, under oath, of all its property, real or personal, taxable and non-taxable, setting forth therein the length in miles * * its entire roadbed, switches * * and showing how many miles or fractions thereof lie in this State, and in each county in this State, and in each city * * and the value of the whole and each part thereof, as subdivided herein; the total amount of the capital stock, its par value and its actual value, and the value of its franchise; the number of engines and their respective values; the gross amount of the receipts of the year preceding, etc., etc. * * and if any of said property is claimed to be exempt from taxation, it shall be separately stated, and the law cited under which the claim is made." By sec. 3876, in case of failure to furnish the schedule, "the commission shall make out the schedule from the best information obtainable."

Sec. 3877. "The members of the railroad commission are constituted State railroad assessors, and they shall, upon the receipt or making and completion of the schedule provided

for in the last two sections, assess all railroads, telegraph, sleeping car and express company property liable to taxation, affixing its true value so that such property shall bear its proportion of taxation," etc.

By sec. 3878, if the railroad assessors have reason to believe that the schedule as furnished is false or fraudulent, they shall not be bound thereby, but shall make proper assessment, giving notice to the railroad company to show cause, "such notice shall be served and returned as a summons from a court."

By sec. 3879 full records of the proceedings are required to be kept of all things done by the State railroad assessors.

By sec. 3880 the assessment as made shall remain on file subject to objections; and by sec. 3881 the State Railroad Assessors shall hear and consider objections to said assessment, and "they shall remain in session until all objections are heard and disposed of, and they may, if they think objections just, sustain the same and amend assessments, if necessary, accordingly."

By sec. 3882 the assessment is to be affirmed after all objections are disposed of.

Sec. 3744, chap. 116, Code 1892, of which the foregoing sections are parts, provides: "The following property, and no other, shall be exempt from taxation:" specifying, but not including, railroads.

Chap. 108, Code 1892, on "Privilege Taxes," by sec. 3317, provides: "A tax on privilege is levied as follows: * * * 3379, Railroads: Railroads are divided into four classes—first, second, third, and narrow gauge—and privilege taxes are levied on them as follows: On each railroad of the first class, per mile, $20; on the second class, $15; on the third class, $10; on a narrow gauge class, $2. The Railroad Commission shall annually, on or before the first Monday of August, classify the several railroads according to the gross earnings of each, and the privilege taxes thereon shall be paid on or before the first day of December."

Code 1892, sec. 3: " * * * All acts or parts of acts, the subjects whereof are revised, consolidated and re-enacted by this Annotated Code, or repugnant to the provisions contained therein, shall be, and the same are hereby, repealed," etc. And sec. 8 provides that "private and local laws not revised and brought into this Annotated Code are not affected by its adoption unless it be expressly so provided herein."

By these provisions of the Code of 1892 the Supreme Court held, in said No. 244, that the exemptions, if existent, were repealed.

There is no pretense that the Code of 1892, under which these taxes were levied, has ever been construed to uphold the exemption. These masterly opinions of the Supreme Court in said No. 244 are referred to as a clear and conclusive presentation of the law upon this point, and they demonstrate that there is no contract of exemption, as averred, and if there was that it was repealed.

Therefore, when the court by the interlocutory decree "finds that the complainant has shown no right to invoke the jurisdiction of this court," R. 51, it must have predicated this finding upon the want of equity on the face of the bill, and that even conceding the existence of jurisdiction, complainant was not entitled to the relief prayed. Hence, the decision of the court below did not turn upon the question of jurisdiction of the court as a Federal court, and, as shown, that is the sole question involved in this certificate.

Did the subsequent laws in the Code of 1892, and the act of 1894 creating State Revenue Agent, under which the State Revenue Agent was threatening to proceed by suit, impair the obligation of said 21st section, if valid, as averred by paragraph XX of the bill?

Under appellant's interpretation of said 21st section, it was necessary to assess the property for taxation, in order that the amount thereof may be ascertained to be paid by the payment of the same amount of construction debts, affidavit thereof, etc.

To make this assessment a judicial tribunal must be created by which, upon notice to the party, the proper value of the property may be ascertained. This was done by secs. 3875 *et seq.*, Code 1892, under sec. 112, Const. 1890.

No objection is pointed out in the bill to the constitutional character of this tribunal, nor to the want of notice. The Supreme Court of the State held this to be a constitutional tribunal having jurisdiction of the subject matter and of the railroad companies.

Y. & M. V. R. R. Co. v. *Adams*, 73 Miss., *supra*;
Supreme Court decided March, 1899, *supra*.

This court will follow and adopt this constuction.
Forsyth v. *Hammond*, 166 U. S. 516–17.

Therefore, the *subsequent* laws of the Code 1892, so far as the assessment is concerned, are not violative of the Federal Constitution.

The act of 1894, p. 29, creating State Revenue Agent and defining his powers confers no right upon the State Revenue Agent to seize or sell any property; his sole power is to bring suit in a court of competent jurisdiction to recover the taxes on the assessments so made. The bill does not aver wherein the said act of 1894 violates the Federal Constitution. The right to sue to enforce a claim for taxes could not violate the Federal Constitution. Said act of 1894 creates an officer with the power and duty "to proceed by suit in the proper court against all officers, county contractors, persons, corporations, companies and associations of persons, for all past due and unpaid taxes of any kind whatever * * He shall have a right of action and may sue at law or in equity in all cases where the State, or any county, municipality or levee board has the right of action or may sue." Sec. 2, act of 1894.

The right of action would have existed in the State and the several counties and municipalities, severally, to have brought suit for the cause of action based upon an assessment for taxes, and a statute vesting these several rights of action in one

officer, so that one suit might determine the whole controversy, could not violate the Federal Constitution.

II.

Eleventh Amendment to Constitution Does Not Confer Jurisdiction.

There could be no right to invoke the jurisdiction of the Federal Court upon the ground that the suit against the State Revenue Agent was a suit against the State, and, therefore, forbidden by the 11th Amendment to the Constitution of the United States, because the bill does not and could not predicate relief on any such ground. That question is raised in defense by the motion to discharge the restraining order. Therefore, as the bill does not show this 11th amendment to be relied on in support of complainant's case, that question is not available to complainant to maintain the jurisdiction.

Walker v. *Collins*, 167 U. S. 59.

Third St. & Sub. Ry. Co. v. *Lewis*, 173 U. S. 457.

III.

Res Adjudicata.

The judgment of the circuit court of Hinds county, rendered at the June term, 1899, for the identical taxes sought to be enjoined in this proceeding, in a suit instituted by the Revenue Agent against appellant after the dismissal of the appeal by the Circuit Court of Appeals, and before this appeal, is *res adjudicata* of the matters of this appeal.

1. An appeal from a decree dissolving an injunction does not affect the validity of the decree appealed from.

Slaughter House Cases, 10 Wal. 273.

Hovey v. *McDonald*, 109 U. S. 150.

2. Suit in the State Court having been brought after the discharge of the restraining order, and before this appeal was taken, and judgment having been rendered therein in the State

court for the taxes sought to be enjoined, that judgment is a bar to the further prosecution of this appeal.

Stout v. *Lye*, 103 U. S. 68.
Case v. *Beauregard*, 101 U. S. 688.
1 *Van-Vleet Res. Adj.*, p. 88 and cases.
Mills v. *Green*, 159 U. S. 651, 654–5–6–7–8.

For these reasons, and those set forth in the brief of Mr. R. C. Beckett, this appeal should be dismissed; or, if there should be found color for the appeal, the decree should be affirmed.

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